Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
Review of Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)	)	

COMMENTS OF PACWEST TELECOMM., INC. ON VERIZON PETITION FOR FORBEARANCE

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SUMMARY

Verizon has filed a petition asking the Commission to forbear from requiring BOC compliance with checklist items four through six and ten of the Section 271 competitive checklist once the corresponding elements are found to no longer satisfy the impairment standard of Section 251. Verizon's Petition should be rejected for a number of reasons. First, it asks the Commission to evaluate its Petition based on the assumption that the Commission has delisted loops, transport, switching, and signaling networks/call-related databases from the list of network elements that must be unbundled pursuant to Section 251. The Commission has made no such determination and, given the record elicited in this proceeding, it should not limit unbundled access to these elements in any manner. The Commission, in determining whether to forbear under Section 10, must consider the effect of the particular forbearance on competitors, consumers, and the public interest. Until the precise nature of the delisting, if any, is determined, it will be impossible to conduct the fact-based forbearance analysis the Commission must conduct. For this threshold reason alone, the Commission should dismiss the Petition.

Second, the premise of Verizon's Petition, *i.e.*, that removal of an element from the Section 251 UNE list automatically calls for removal of the corresponding item from the Section 271 checklist, is fallacious. Section 271 imposes obligations on RBOCs that are independent of, and go beyond, those obligations imposed by Section 251 on incumbent local exchange companies ("ILECs"). In particular, Section 271 contains independent unbundling obligations. In fact, this Commission has rejected the very premise of Verizon's argument. The Commission, pursuant to Section 271, continues to evaluate RBOC performance in regard to elements such as operator services/directory assistance despite the removal of this element from the list of Section 251 UNEs. In addition, the public interest standard found in

Section 271(d)(3)(c) provides another statutory basis for unbundling if such access is deemed necessary to promote the public interest. Section 271(d)(4) provides a further obstacle to Verizon's Petition because it precludes the Commission from limiting the Section 271 checklist.

The legislative history of Section 271 supports the proposition that Congress intended Section 271 requirements to be in place for some time, including after Section 271 authority is granted. The language of the Act explicitly requires the Commission to continue to police Section 271 compliance even after the RBOC obtains such authority in a particular state. Section 10(d) precludes any forbearance from any Section 271 provisions until the requirements of Section 271 are "fully implemented." A recent letter from four Senators to Chairman Powell clearly indicated that they did not think Section 271 had been "fully implemented" and called for more rigorous enforcement of Section 271 requirements. They indicated that markets must be fully opened to competition before the Commission can even begin to consider deregulation. For these reasons, the Commission should summarily dismiss Verizon's Petition.

If, for some reason, the Commission decides to consider the merits of Verizon's Petition, the Commission should find that Verizon has failed to meet the standards of Section 10. While it is difficult, if not impossible, to conduct a proper forbearance analysis until the parameters of any delisting are known, even a cursory review of Verizon's Petition demonstrates it fails to meet the exacting requirements of Section 10. Under its Section 10 analysis, the Commission has required a much more mature development of competition in a market than what is evidenced in the local exchange market. The Commission has found that duopoly market power does not constitute sufficient competition to meet the requirements of Section 10, and the local exchange market remains a monopoly. In many areas of the U.S. there is still no competitive choice for consumers, and the only check on RBOC pricing continues to be regulation and not

competition. Given the RBOC's predilection to challenge any market opening effort, it is clear that forbearance would impede or, at a minimum, delay the ability of states to open their markets to competition, and keep the markets open to competition. States where Section 271 authority has been granted may see substantial backsliding.

In short, competition is far too nascent and precarious to begin thinking of removal of any Section 271 obligations. Section 271 is a cornerstone of the Act, and it is far too early to consider removing it.

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PacWest Telecomm, Inc. ("PacWest") submits these comments in response to the August 1, 2002 Public Notice seeking comment on the Petition for Forbearance filed by the Verizon Telephone Companies.[1] In its Petition, Verizon formally seeks the relief it had requested in its Comments and Reply Comments in the Commission's Triennial Review proceeding, *i.e.*,[2] that if a network element does not meet the Section 251(d)(2) standard for unbundling, the Commission should deem the corresponding Section 271 checklist item satisfied. Specifically, Verizon asks the Commission to forbear from applying items four through six and ten of the Section 271 competitive checklist once the corresponding elements no longer need to be unbundled under Section 251(d)(2).[3] Verizon contends that this forbearance should apply in states where Section 271 authority has already been granted as well as those states where it has not.

For the reasons stated below, the Commission should deny Verizon's Petition.

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1 CC Docket No. 01-338, Wireline Competition Bureau Seeks Comment on Verizon Petition for Forbearance, Public Notice, DA 02-1884 (August 1, 2002).

2 *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 01-361, 16 FCC Rcd. 22781 (Dec. 20, 2001).

I. VERIZON'S PETITION IS FORECLOSED BY THE LANGUAGE OF THE ACT

A. A Finding of Lack of Impairment Under Section 251 Does Not Automatically Lead to Forbearance from Section 271 Requirements

Verizon bases its Petition for Forbearance on the contention that if an element no longer meets the Section 251(d)(2) standard for unbundling, forbearance with the corresponding checklist item is required by Section 10. Verizon's contention, however, is foreclosed not only by the letter and spirit of Section 271, but also by the Commission's own interpretation of the independent obligations imposed by Section 271.

1. Section 271 Obligations Are Independent Of, and Go Beyond, The Obligations Imposed by Section 251

Section 271 of the Telecommunications Act was intended to be a *quid pro quo* arrangement for regional Bell Operating Companies ("RBOCs") allowing them to provide in-region, interLATA service if they opened up the local exchange markets in the particular region to competition.[4] Verizon seeks to transform Section 271 into an afterthought contending that "where an element no longer meets the Section 251(d)(2) standard for unbundling, forbearance with respect to the parallel checklist item is required under Section 10."[5] Verizon's Petition ignores the fact that Section 271 of the Act imposes obligations that are independent of, and go beyond, those found in Section 251.

Section 251 implements general local competition obligations on all incumbent local exchange carriers.[6] Section 271, however, contains provisions directed specifically at RBOCs,

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3 Verizon Petition at 3.

4 *See, Qwest Corporation v. U.S.*, 48 Fed.Cl. 672, 696 (2001). The Court of Federal Claims noted that the Telecom Act "created a matrix of interlocking opportunities for ILECs" where "they could enter some new markets, but the *quid pro quo* was that they open up their own local exchange markets to competition."

5 Verizon Petition at 3.

6 *See SBC Communications, Inc. v. FCC,* 154 F.3d 226, 231 (5th Cir. 1998), *cert denied*, 525 U.S. 1113 (1999).

and imposes additional obligations that go beyond those imposed on other ILECs.[7] As the U.S. Court of Appeals for the Fifth Circuit has recognized:

> '[b]ecause the BOCs' facilities are generally less dispersed than GTE's, they can exercise bottleneck control over both ends of a [long distance] telephone call in a higher fraction of cases than GTE' (or any of the other LECs, for that matter), and it is thus rational to subject them to additional burdens in order to achieve the overall goal of competitive local and long distance service.[8]

Thus, it is beyond dispute that Section 271 was designed to impose independent and additional obligations on RBOCs that go beyond the general requirements imposed on ILECs via Section 251. Satisfaction of Section 271 does not automatically follow from meeting the requirements of Section 251.

2. Checklist Items 4, 5, 6 and 10 Are Independent Obligations

Verizon's Petition asks the Commission to forbear specifically from checklist Items four through six and ten once the corresponding elements are no longer required to be unbundled under Section 251.[9] Verizon's Petition ignores the explicit language of these provisions that create independent obligations for the RBOCs. Section 271(c)(2)(B)(iv) requires RBOCs to provide "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[10] Section 271(c)(2)(B)(v) requires RBOCs to provide "local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[11] Section 271(c)(2)(B)(vi) requires RBOCs to provide "local

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7 *Id.*

8 *Id.* at 243, *citing, BellSouth Corporation v. FCC*, 144 F.3d 58, 67 (D.C. Cir. 1998).

9 Verizon Petition at 3. For purposes of these Comments, Commenters will assume for the sake of argument that these elements have been delisted by the Commission in some form. The record in CC Docket No. 01-338 demonstrates, however, that Section 251 unbundling obligations in regard to the elements should not be limited in any way.

10 47 U.S.C. § 271(c)(2)(B)(iv).

11 47 U.S.C. § 271(c)(2)(B)(v).

switching unbundled from transport, local loop transmission, or other services."[12] Section 271(c)(2)(B)(x) requires RBOCs to provide "nondiscriminatory access to databases and associated signaling necessary for call routing."[13] It is clear then that, pursuant to Section 271, RBOCs are required to provide access to loop, transport, switching, and signaling/call-related databases network elements. Verizon's Petition would render these provisions superfluous and excise them from the Act. As demonstrated *infra,* these requirements do not sunset once Section 271 authority is granted in a particular states. The Act requires that RBOCs continue to meet these checklist obligations even after obtaining their Section 271 authority. Verizon has proffered no basis for ignoring the explicit language of these provisions.

3. The Commission Has Interpreted Section 271 Requirements As Imposing Independent Obligations on RBOCs

It is clear from the language of the checklist provisions that these unbundling obligations are independent of the Section 251 obligations. In fact, the Commission has already interpreted these obligations as independent requirements. As the Commission noted in the *UNE Remand Order*:

> We also note that Congress specified certain network elements in the Section 271 checklist that BOCs are required to unbundle before they obtain in-region interLATA relief. In particular, the checklist requires BOCs to demonstrate that they are providing loops, switching, transport, signaling and databases, and operator services/directory assistance.[14] Accordingly, we may consider whether requiring all incumbent LECs to unbundle these same elements would promote the rapid introduction of competition on a nationwide basis.[15]

Thus, the Commission explicitly recognized that checklist unbundling obligations are distinct from Section 251 obligations. The Commission went on to add:

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12 47 U.S.C. § 271(c)(2)(B)(vi).
13 47 U.S.C. § 271(c)(2)(B)(x).
14 47 U.S.C. § 271(c)(2)(B).

> In this Order, we conclude that circuit switching and shared transport need not be unbundled in certain circumstances. Nonetheless, providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval.[16]

Thus, the Commission has already addressed and rejected the very position Verizon relies on in this Petition. The Commission found that, even if it no longer requires an element to be unbundled pursuant to Section 251, the unbundling obligations of Section 271 are unaffected and remain intact.

A case in point is operator services and directory assistance which the Commission removed from the list of unbundled network elements in the *UNE Remand Order*.[17] The Commission continues to require, however, that "checklist item obligations that do not fall within a BOC's UNE obligations, however, still must be provided in accordance with Sections 201(b) and 202(a), which require that rates and conditions be just and reasonable, and not unreasonably discriminatory."[18] While PacWest does not agree that RBOCs should be permitted a different pricing standard in regard to Section 271 network elements, and demonstrate below why a different standard should not be applied, this statement unequivocally demonstrates the fallacy of Verizon's Petition. The Section 271 standards the Commission currently applies in regard to operator services and directory assistance date back to the *Second BellSouth Louisiana Order* which predates the delisting of operator services and directory

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15 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, ¶ 108 (1999)("*UNE Remand Order*"), *remanded, USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002)..

16 *UNE Remand Order* at ¶ 468.

17 *UNE Remand Order* at ¶¶ 441-442.

18 *Application of Verizon New Jersey, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in New Jersey,* CC Docket No. 01-347, Memorandum Opinion and Order, FCC 02-189, Appendix C, ¶ 58 (June 24, 2002).

assistance.[19] Thus, the Commission has not allowed its decisions in regard to Section 251 unbundling to limit its review of Section 271 requirements.

In fact, the Commission could take no other approach as Section 271(d)(4) explicitly proscribes the Commission from limiting the checklist. Section 271(d)(4) states that the Commission "may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[20] Verizon's Petition would create the potential for elimination of four vital elements of the checklist, including loops, transport, switching and signaling, and call/related databases. These elements have proven to be among the most central considerations in the review of Section 271 applications.

Verizon argues that "forbearance is warranted as soon as an element no longer satisfies the impairment test."[21] Verizon ignores the fact that failure to meet the impairment standard does not necessitate delisting of an element under Section 251, much less Section 271. As noted in the Triennial Review proceeding, the interpretation of the "at a minimum" language found in Section 251(d)(2) that is most consistent with the express language of the statute is that the "Commission must require the unbundling determined under the 'necessary' and 'impair' tests as the minimum level of unbundling, but may require more based on other goals."[22] Clearly opening markets irreversibly to competition is one such goal and mandates unbundling that would go beyond the impairment standard. Indeed, checklist items four through six and ten contain no impairment standard. In addition, Section 271(d)(3)(C) requires that the application be "consistent with the public interest, convenience and necessity."[23] The Commission stated that

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19 *See id.* at ¶ 57.
20 47 U.S.C. § 271(d)(4).
21 Verizon Petition at 3, n. 8.
22 CC Docket No. 01-338, Comments of The Association of Local Telecommunications Services, *et al.*, at 36.
23 47 U.S.C. § 271(d)(3)(C).

it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[24] As the Department of Justice notes, in-region, interLATA entry by a RBOC should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.[25]

The importance of the public interest standard was recently reaffirmed by Senators Burns, Hollings, Inouye, and Stevens in a letter to Chairman Powell.[26] In that letter, the Senators stated:

> [t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.[27]

The clear intimation then is that the Commission not only may require, but should require, unbundling pursuant to Section 271 if the RBOCs are failing to provide "affordable, timely and consistent access" to their networks.

In fact, the legislative history behind Section 271 demonstrates that the drafters of the Act anticipated that the checklist provisions would be in place for a significant period of time. The Senate debate evidenced the view of the Act's drafters that BOCs would have to "provide loops,

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[24] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 386 (1997) ("*Ameritech Michigan 271 Order*").

[25] *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also, Ameritech Michigan 271 Order* at ¶ 382.

[26] Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) ("*Senators' Letter*").

[27] *Id.* at 3.

transport, and switching for 'the reasonably foreseeable future."[28] The sponsor of the Senate Bill noted that the checklist included:

> [t]hose things that a telecommunications carrier would need from a Bell operating company in order to provide a service such as telephone exchange service or exchange access service in competition with the Bell operating company. The competitive checklist could best be described as a snapshot of what is required for these competitive services now and in the reasonably foreseeable future.[29]

This language conveys the notion that "reasonably foreseeable future" would include post-271 authority activity. One Senator noted that benefits from the Act may take at least ten years to materialize based on the amount of time it took the benefits of competition to materialize in the long distance market after divestiture.[30] As Z-Tel noted in the Triennial Review proceeding, "[g]iven the extensive delays in implementation caused by BOC litigation up to and including today, the 'reasonably foreseeable future' has hardly begun."[31]

In addition, the RBOCs' bottleneck control over last mile facilities further delays the introduction of full competition into the local exchange market. The U.S. Supreme Court chronicled how control over the local exchange gives ILECs a nearly insurmountable advantage:

> A local exchange is thus a transportation network for communications signals, radiating like a root system from a "central office" (or several offices for larger areas) to individual telephones, faxes, and the like. It is easy to see why a company that owns a local exchange (what the Act calls an "incumbent local exchange carrier," 47 U.S.C. § 251(h)), would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long-distance calling as well. A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the "last mile" of feeder wire, the local loop, to the

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28 CC Docket No. 01-338, Reply Comments of Z-Tel Communications, Inc. at 111 (July 17, 2002) ("*Z-Tel Reply Comments*"), *citing*, 141 Cong. Rec. S8,469 (daily ed. June 15, 1995) (statement of Sen. Pressler).

29 *Id.*

30 *Id., citing,* 141 Cong. Rec. S7,909 (daily ed. June 7, 1995).

31 *Z-Tel Reply Comments* at 112.

> thousands (or millions) of terminal points in individual houses and businesses. The incumbent company . . . could place conditions or fees (called "access charges") on long-distance carriers seeking to connect with its network. In an unregulated world, another telecommunications carrier would be forced to comply with these conditions, or it could never reach the customers of a local exchange.[32]

Thus, checklist obligations will need to be in place for a long while to ensure that CLECs are able to overcome the "nearly insurmountable" advantages that ILECs possess and to ensure markets are truly opened to competition.

In fact, the Act's language expressly contemplates that checklist obligations remain in place even after the Commission has deemed a market opened to competition under Section 271. Section 271(d)(6) gives the Commission authority to take certain actions if the RBOC fails to meet any of the conditions required for approval, including suspension or revocation of such approval.[33] The Performance Assurance Plans approved by the Commission monitor the RBOCs' provisioning of, among other things, loops, transport, and switching facilities. Clearly, the Commission has recognized that, even though it may find a market open to competition, the possibility of backsliding still remains and, therefore, continuing enforcement of checklist obligations is necessary. Thus, if a grant of Section 271 authority does not end checklist obligations, a finding of a lack of impairment should not as well.

II. VERIZON'S PETITION IS PREMATURE

As noted in the previous section, the premise upon which Verizon bases its Petition is foreclosed by the language of Section 271. If, for some reason, the Commission does find a basis to consider forbearance based on the delisting of a UNE, it should find Verizon's Petition to be premature. Verizon provides a theoretical argument for forbearance that is based on the premise that the Commission will delist loops, transport, switching, and/or signaling/call-related

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32 *Verizon Communications, Inc. v. FCC,* 122 S.Ct. 1646, 1661-1662 (May 13, 2002) ("*Verizon*").

33 47 U.S.C. § 271(d)(6)(A).

databases. The Commission, however, has made no such determination and, until it does, it would be imprudent to consider Verizon's Petition. Section 10 mandates a very fact-specific analysis for the Commission to undertake where it must consider, *inter alia*, the impact of forbearance on the rates and practices of the RBOCs, the effect on consumers, and the public interest. The public interest consideration requires examination of the effect on competition. Until the parameters of the delisting, if any delisting occurs, are known, parties commenting cannot develop an adequate record for the Commission to make this determination. For instance, while as described below, the Commission has not defined "fully implemented" under Section 10(d), the Commission has denied petitions for forbearance on the basis that the RBOCs have not developed a record on which to determine that Section 271 has been fully implemented.[34] Until the Commission makes its determinations as to whether any UNEs should be delisted, it is impossible for parties to conduct a full Section 10 analysis. If the Commission sees any merit in Verizon's Petition, it should still wait until it makes its determination in the *Triennial Review* proceeding and then ask parties to comment on the basis, or lack thereof, for forbearance with respect to the specific elements delisted.

III. VERIZON HAS NOT MET THE STANDARD FOR FORBEARANCE

In order to forbear, the Commission, pursuant to the requirements of Section 10(a), must determine that: i) "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;" ii) "enforcement of such regulation or provision is not necessary for the protection of consumers;" and iii) "forbearance from applying such provision

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[34] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012, ¶ 73 (1998).

or regulation is consistent with the public interest."[35] In regard to the public interest consideration, the Commission must determine whether forbearance will promote competitive market conditions and enhance competition among providers of telecommunications service.[36] Since the proposed forbearance would involve requirements of Section 271, Section 10(d) requires that the Commission must also determine that the requirements of Section 271 have been "fully implemented."[37] While PacWest is limited in its ability to conduct a full forbearance analysis given the premature nature of Verizon's Petition, even a cursory application of Section 10's standards demonstrates that Verizon's Petition should be dismissed.

A. Continued Application of Section 271 Checklist Items Is Necessary to Not Only Ensure the Opening of Markets But Also To Prevent Backsliding and the Closing of Competitive Markets

1. Verizon's Petition Does Not Meet the Requirements of Section 10(a)

In applying its forbearance power under Section 10(a), the Commission has heretofore required the development of a much more significant amount of competition than that which the local exchange market currently exhibits. For instance, in determining whether to forbear from the requirements of Sections 201 and 202 of the Act for broadband PCS providers, the Commission clearly suggested that duopoly market power would not be sufficient to support forbearance.[38] The Commission noted that even though the CMRS market was progressing from duopoly market power, it was still not enough for forbearance. The Commission found that:

> Nonetheless, the competitive development of the industry in which broadband PCS providers operate is not yet complete and continues to require monitoring.

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35 47 U.S.C. § 160(a).

36 47 U.S.C. § 160(b).

37 47 U.S.C. § 160(d).

38 *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, GN Docket No. 94-33, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 21 (1998) ("Until a few years ago, licensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source.")

> The most recent evidence indicates that prices for mobile telephone service have been falling, especially in geographic markets where broadband PCS has been launched. These price declines, however, have been uneven, and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace. . . . Furthermore, even if a licensee is providing service in part of its licensed service area, there may be large areas left without competitive service.[39]

The Commission found "that current market conditions alone will not adequately constrain unjust and unreasonable or unjustly and unreasonably discriminatory rates and practices" and, therefore, concluded that the first prong of the Section 10 forbearance standard had not been satisfied.[40]

In the local exchange market, competitive market conditions are much less developed than the CMRS market. In the residential mass market, even taking RBOC statistics at face value, there remains monopoly market power.[41] The price discipline the Commission seeks in evaluating forbearance is not present. A striking example is the special access market where RBOCs continue to charge far above the forward-looking cost of the facilities and have been raising prices where they have obtained pricing flexibility instead of lowering them.[42] Moreover, unlike the CMRS market, consumers do not have the opportunity to choose from several providers. Over one-third of the zip codes in the U.S. still do not have a competitive provider of local service.[43] Thus, the local market still has an enormous way to go in regard to competition before the Commission should even begin to consider forbearance.

2. Forbearance Would Not Be In the Public Interest In That It Would Inhibit the Opening of Local Markets

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39 *Id.* at ¶ 22.

40 *Id.* at ¶ 24.

41 *See Z-Tel Reply Comments* at 42.

42 CC Docket No. 01-338, Reply Comments of The Association of Local Telecommunications Services, *et al.*, at 65 (July 17, 2002).

43 *Federal Communications Commission Releases Data on Local Telephone Competition,* FCC Press Release at 2 (July 23, 2002).

Under Verizon's Petition, forbearance would apply not only when a RBOC has obtained Section 271 authority in a state, but also when it has not obtained authority.[44] Thus, in states where no Section 271 authority has been granted, considerations of loop, transport, switching, and signaling/call-related databases would be removed from checklist consideration once those elements are delisted. Arguably, these are the most important parts of the checklist and contain the issues that have elicited most discussion in prior Section 271 proceedings. As noted above, checklist obligations go further than even Section 251 obligations because, under Section 271, the Commission must ensure that markets are fully and irreversibly open to competition. By removing evaluation of the market in regard to loops, transport, and switching, it would be virtually impossible for the Commission to determine if the particular market is open to competition, much less that it is irreversibly open to competition. The fact that an element may not meet the Commission's national impairment standard does not mean that competitors may not be vulnerable to discriminatory practices or that access to an element may not be necessary in a particular state.

A case in point is unbundled switching. The Commission has limited access to unbundled switching. Under Verizon's approach, switching would be removed from the competitive checklist at least in those areas where unbundled switching is not required. The RBOCs would argue that this would foreclose consideration by both the Commission and the state PUC as to RBOC provisioning of switching in those areas and, thereby, limit the ability to check unjust and unreasonable practices. In Texas, the Public Utility Commission of Texas required SWBT to provide unbundled local switching in all zones finding that:

> According to the FCC, incumbent local exchange carriers (ILECs) must provide local switching as an unbundled network element (UNE) "except for local circuit

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[44] Verizon Petition at 3, n. 8.

> switching used to serve end users with four or more lines in access density zone 1 in the top 50 Metropolitan Statistical Areas (MSAs), **provided that** the ILEC provides nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout zone 1." The FCC's decision to carve out an exception to the requirement that ILECs provide local switching as a UNE is expressly predicated on the availability of the EEL, and the exception is therefore triggered **only** when the ILEC provides nondiscriminatory, cost-based access to the EEL. The Arbitrators find that SWBT has failed to prove that it provides nondiscriminatory cost-based access to the EEL. Indeed, SWBT conceded that it does not provide nondiscriminatory access to the EEL, and therefore the exception does not apply. In addition, MCIm presented unrefuted evidence that SWBT has obstructed MCIm's attempt to obtain EELs.[45]

The Texas PUC required SWBT to provide unbundled local switching in all zones.[46] The Texas PUC, in reaching this determination, "considered the evidence in light of each of the factors specified in 47 C.F.R. § 51.317: cost; timeliness; ubiquity; impact on network operations; rapid introduction of facilities; facilities-based competition; investment and innovation; certainty to requesting carriers regarding availability; administrative practicality; and reduced regulation."[47] At some future point, the Commission may decide to remove the unbundled switching requirement altogether and not predicate such delisting on the availability of the EEL. CLECs, however, may still be unable to provide service without access to ILEC switches in certain areas and, for that reason, competition may not develop in those areas. Keeping Section 271 requirements intact would support the ability of state commissions to address those situations by giving them the flexibility to apply unbundling requirements in certain markets to ensure that those markets will be open to competition.

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[45] *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc., and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, PUCT Docket No. 24542, Arbitration Award at 65 (May 1, 2002) (emphasis in original).

[46] *Id.* at 69.

[47] *Id.* at 70.

Thus, while the Commission may decide to remove an element on a national basis, circumstances in a particular state may warrant unbundling to protect against unreasonable practices such as what occurred in Texas.[48] Removing elements from the competitive checklist, however, could be argued to limit the ability of both this Commission and the state PUCs to check those practices and ensure that the particular market is open to competition. While states should still be allowed to implement further unbundling obligations pursuant to the Section 271 review, the RBOCs, if forbearance is granted, will surely challenge the states authority to do so, embroiling all concerned in more jurisdictional litigation.

Verizon's Petition could also limit the vital role of the states in the Section 271 process. By removing checklist items, RBOCs may argue that states are circumscribed in what issues they could address. State commissions are in the best position to determine what is needed to open their particular markets to competition, but would be impeded in their ability to do so if they could not address issues in regard to loops, transport, or switching. States have often used the powers granted to them under Section 251 and Section 271 to implement the conditions necessary to open their markets to competition. For instance, the T2A Agreement, on which SBC's application in Texas was based, was the outgrowth of a hearing on public interest issues in the Texas PUC 271 proceeding.[49] The T2A, which is a mega-interconnection agreement, covers numerous issues including loops, transport, and switching. States that have not completed a Section 271 proceeding prior to elements being removed from the checklist may not be able to effect such a comprehensive agreement.

3. Forbearance Would Not Be In The Public Interest As It Would Lead to Backsliding and the Closing of Competitive Markets

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[48] The Texas PUC would be justified in imposing additional unbundling obligations that go beyond what the Commission mandates both under Section 251 and 271.

[49] CC Docket No. 00-4, Evaluation of the Public Utility Commission of Texas at 3 (Jan. 31, 2000).

In regard to markets deemed open to competition by this Commission, forbearance from checklist considerations would imperil the nascent and precarious state of current competition. Verizon asserts that competition will ensure that rates and practices are just and reasonable. The experience in Texas, the second state the Commission found to be open to competition, demonstrates that this is not the case. AT&T notes how the Public Utility Commission of Texas filed a report last year on the state of local competition in Texas. As AT&T chronicles:

> The *TPUC Report* makes clear that even today, a year after obtaining 271 authorization in Texas, SWBT retains monopoly control of the residential local market in Texas and has raised prices for local service. CLEC competition for residential customers, while initially active, has faded, as experience has demonstrated that entry into local residential markets is not profitable. This lack of competition in Texas has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and having established its market power, to raise its price for long distance service.[50]

Thus, the ultimate losers from forbearance will be the consumers who will fail to see a decrease in local service rates, and will see their long distance rates ultimately rise. This is why the Commission needs to keep in place checklist requirements and vigilantly enforce them. If not, competitive prospects will be dimmed, and the ultimate loser will be the consumers.

Removal of checklist items will give RBOCs a free rein to backslide and close markets. Since, under Verizon's Petition, unbundling requirements will be precluded both under Section 251 and Section 271, there will be no way to prevent the closing of competitive markets.

4. The Requirements of Section 271 Have Not Been Fully Implemented

Section 10(d) clearly evidences a Congressional intent that forbearance in regard to Section 271 provisions should not be entered into lightly. As the Commission has noted, the "fully implemented" language of Section 10(d) demonstrates that Congress considered

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[50] CC Docket No. 01-194, Comments of AT&T Corp. at 88-89 (September 10, 2001)

Section 271 to be a "cornerstone" of the 1996 Act.[51] While the term "fully implemented" is not defined in the Act, it is hard to imagine that the drafters would consider the Act to be fully implemented six years after the Act, with CLECs possessing less than ten percent of the local market. The above-referenced letter of the Senators in regard to the need for a heightened public interest evaluation under Section 271 demonstrates that these Senators do not think the requirements of Section 271 are anywhere close to being fully implemented. The Senators specifically note that "but the Act has not yet succeeded in opening markets and making deregulation possible, largely because its local market opening provisions have not been fully implemented."[52] They added, "the deregulation of the Bell companies envisioned by the Act is predicated on the existence of a competitive local marketplace – which does not exist today."[53] In fact, it is hard to contemplate even beginning a discussion of whether Section 271 has been "fully implemented" until Section 271 authority is at least granted in all states. The Commission previously declined to forbear from Section 271 requirements in regard to advanced services finding that "Congress did not provide us with the statutory authority to forbear from these critical market-opening provisions of the Act until their requirements have been fully implemented."[54] With Section 271 authority granted in only 15 states, and competition still precarious even in those states, Section 271 is far from being "fully implemented." For this reason alone, Verizon's Petition should be denied.

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51 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012, ¶ 73 (1998).

52 *Senator's Letter* at 3.

53 *Id.* at 1.

54 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, ¶ 11 (1998).

IV. PRICING OF ELEMENTS UNBUNDLED PURSUANT TO SECTION 271

The Commission should adhere to its determination that delisting of UNEs under Section 251 has no impact on Section 271 obligations. The Commission should, however, reconsider its determination as to how elements unbundled pursuant to Section 271 are priced. In the *UNE Remand Order*, the Commission determined:

> In this Order, we conclude that circuit switching and shared transport need not be unbundled in certain circumstances. Nonetheless, providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval. We therefore must decide what prices, terms, and conditions apply to these elements that no longer need to be unbundled.[55] We conclude that the prices, terms, and conditions set forth under sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of Section 271.[56]

The Commission held that "[i]f a checklist network element does not satisfy the unbundling standards in Section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)."[57] The Commission intimated that RBOCs could charge marketplace rates for these elements as opposed to forward-looking prices.[58] This finding, however, is at odds with both Commission statements on pricing of network elements and the recent decision of the U.S. Supreme Court in *Verizon v. FCC.*

The Commission has noted that "efficient competitive entry into the local market is vitally dependent upon appropriate pricing of checklist items."[59] The Commission determined

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55 Network elements unbundled pursuant to Section 251(c) must comply with the pricing standards of Section 252(d)(1). 47 U.S.C. § 251(c)(3).

56 *UNE Remand Order* at ¶¶ 468-469.

57 *Id. at* ¶ 470.

58 *Id. at* ¶ 473.

59 *Ameritech Michigan 271 Order* at ¶ 281.

that the competitive checklist incorporates the Section 252(d) cost-based standard.[60] The Commission noted:

> Because the purpose of the checklist is to provide a gauge for whether the local markets are open to competition, we cannot conclude that the checklist has been met if prices for interconnection and unbundled elements do not permit efficient entry. That would be the case, for example, if such prices included embedded costs. Moreover, allowing a BOC into the in-region interLATA market in one of its states when the BOC is charging noncompetitive prices for interconnection or unbundled network elements in that state could give that BOC an unfair advantage in the provision of long distance or bundled services.[61]

Under this reasoning, elements unbundled pursuant to the competitive checklist should be priced under the same TELRIC standard that the Commission has established pursuant to Section 252(d) for UNEs. The Commission has noted that "new entrants cannot make decisions efficiently unless prices for unbundled elements are based on forward-looking economic costs."[62] The Commission added that:

> Adopting a pricing methodology based on forward-looking costs best replicates, to the extent possible, the conditions of a competitive market. In addition, a forward-looking cost methodology reduces the ability of an incumbent to engage in anticompetitive behavior, permits new entrants to take advantage of the incumbent's economies of scale, scope, and density, and encourages efficient market entry and investment by new entrants.[63]

Since the purpose of Section 271 is to open markets fully and irreversibly to competition, it follows that prices for elements unbundled under Section 271 must be based on forward-looking economic costs, regardless of whether the element meets the impairment standard.

These principles were affirmed and reinforced by the Supreme Court. The Court quoted the Commission's *Local Competition Order* in noting:

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60 *Id.* at ¶ 285.

61 *Id.* at ¶ 287.

> [I]n some areas, the most efficient means of providing competing service may be through the use of unbundled loops. In such cases, preventing access to unbundled loops would either discourage a potential competitor from entering the market in that area, thereby denying those consumers the benefits of competition, or cause the competitor to construct unnecessarily duplicative facilities, thereby misallocating societal resources.[64]

The Court observed that pricing network elements above their forward-looking costs would risk keeping potential entrants out of the market.[65] If the goal of Section 271 is to promote competition and open markets, it logically follows that checklist items should be priced at forward-looking economic costs because such prices promote efficient market entry.

V. CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's Petition for Forbearance.

Respectfully submitted,

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Dated: September 3, 2002

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62 *Id.* at ¶ 289.
63 *Id.* at ¶ 289.
64 *Verizon,* 122 S.Ct. at 1672.
65 *Id.*

CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on September 3, 2002, I caused to be served upon the following individuals the Comments of PacWest Telecomm., Inc. on Verizon Petition for Forbearance in CC Docket No. 01-338.

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